

(c) **APPLICABILITY, WAIVER AUTHORITY, AND REFERRAL OF OFFERS.**—

(1) **APPLICABILITY.**—Subsection (b) does not apply to a qualification requirement established by statute prior to October 30, 1984.

(2) **WAIVER AUTHORITY.**—

(A) **SUBMISSION OF DETERMINATION OF UNREASONABLENESS.**—Except as provided in subparagraph (C), if it is unreasonable to specify the standards for qualification that a prospective offeror or its product must satisfy, a determination to that effect shall be submitted to the advocate for competition of the procuring activity responsible for the purchase of the item subject to the qualification requirement.

(B) **AUTHORITY TO GRANT WAIVER.**—After considering any comments of the advocate for competition reviewing the determination, the head of the procuring activity may waive the requirements of paragraphs (2) to (5) of subsection (b) for up to 2 years with respect to the item subject to the qualification requirement.

(C) **NONAPPLICABILITY TO QUALIFIED PRODUCTS LIST.**—Waiver authority under this paragraph does not apply with respect to a qualified products list.

(3) **SUBMISSION AND CONSIDERATION OF OFFER NOT TO BE DENIED.**—A potential offeror may not be denied the opportunity to submit and have considered an offer for a contract solely because the potential offeror has not been identified as meeting a qualification requirement if the potential offeror can demonstrate to the satisfaction of the contracting officer that the potential offeror or its product meets the standards established for qualification or can meet those standards before the date specified for award of the contract.

(4) **REFERRAL TO SMALL BUSINESS ADMINISTRATION NOT REQUIRED.**—This subsection does not require the referral of an offer to the Small Business Administration pursuant to section 8(b)(7) of the Small Business Act (15 U.S.C. 637(b)(7)) if the basis for the referral is a challenge by the offeror to either the validity of the qualification requirement or the offeror's compliance with that requirement.

(5) **DELAY OF PROCUREMENT NOT REQUIRED.**—The head of an agency need not delay a proposed procurement to comply with subsection (b) or to provide a potential offeror with an opportunity to demonstrate its ability to meet the standards specified for qualification.

(d) **FEWER THAN 2 ACTUAL MANUFACTURERS.**—

(1) **SOLICITATION AND TESTING OF ADDITIONAL SOURCES OR PRODUCTS.**—If the number of qualified sources or qualified products available to compete actively for an anticipated future requirement is fewer than 2 actual manufacturers or the products of 2 actual manufacturers, respectively, the head of the agency concerned shall—

(A) publish notice periodically soliciting additional sources or products to seek qualification, unless the contracting officer determines that doing so would compromise national security; and

(B) subject to paragraph (2), bear the cost of conducting the specified testing and eval-

uation (excluding the cost associated with producing the item or establishing the production, quality control, or other system to be tested and evaluated) for a small business concern or a product manufactured by a small business concern that has met the standards specified for qualification and that could reasonably be expected to compete for a contract for that requirement.

(2) **WHEN AGENCY MAY BEAR COST.**—The head of the agency concerned may bear the cost under paragraph (1)(B) only if the head of the agency determines that the additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to offset (within a reasonable period of time considering the duration and dollar value of anticipated future requirements) the cost incurred by the agency.

(3) **CERTIFICATION REQUIRED.**—The head of the agency shall require a prospective contractor requesting the Federal Government to bear testing and evaluation costs under paragraph (1)(B) to certify its status as a small business concern under section 3 of the Small Business Act (15 U.S.C. 632).

(e) **EXAMINATION AND REVALIDATION OF QUALIFICATION REQUIREMENT.**—Within 7 years after the establishment of a qualification requirement, the need for the requirement shall be examined and the standards of the requirement revalidated in accordance with the requirements of subsection (b). This subsection does not apply in the case of a qualification requirement for which a waiver is in effect under subsection (c)(2).

(f) **WHEN ENFORCEMENT OF QUALIFICATION REQUIREMENT NOT ALLOWED.**—Except in an emergency as determined by the head of the agency, after the head of the agency determines not to enforce a qualification requirement for a solicitation, the agency may not enforce the requirement unless the agency complies with the requirements of subsection (b).

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3761.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3311	41:253c.	June 30, 1949, ch. 288, title III, §303C, formerly §303D, as added Pub. L. 98-577, title II, §202(a), Oct. 30, 1984, 98 Stat. 3069; renumbered §303C, Pub. L. 99-145, title XIII, §1304(c)(4)(A), Nov. 8, 1985, 99 Stat. 742.

In subsection (d)(1)(A), the words “in the Commerce Business Daily” are omitted as obsolete. See revision note for section 1708(d) of the revised title.

CHAPTER 35—TRUTHFUL COST OR PRICING DATA

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§ 3501. General

(a) DEFINITIONS.—In this chapter:

(1) COMMERCIAL ITEM.—The term “commercial item” has the meaning provided the term by section 103 of this title.

(2) COST OR PRICING DATA.—The term “cost or pricing data” means all facts that, as of the date of agreement on the price of a contract (or the price of a contract modification) or, if applicable consistent with section 3506(a)(2) of this title, another date agreed upon between the parties, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. The term does not include information that is judgmental, but does include factual information from which a judgment was derived.

(3) SUBCONTRACT.—The term “subcontract” includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or a subcontractor.

(b) REGULATIONS.—

(1) MINIMIZING ABUSE OF COMMERCIAL SERVICES ITEM AUTHORITY.—The Federal Acquisition Regulation shall ensure that services that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are of a type offered and sold competitively in substantial quantities in the commercial marketplace, may be treated as commercial items for purposes of this chapter only if the contracting officer determines in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for the services.

(2) INFORMATION TO SUBMIT.—To the extent necessary to make a determination under paragraph (1), the contracting officer may request the offeror to submit—

(A) prices paid for the same or similar commercial items under comparable terms and conditions by both government and commercial customers; and

(B) if the contracting officer determines that the information described in subparagraph (A) is not sufficient to determine the reasonableness of price, other relevant information regarding the basis for price or cost, including information on labor costs, material costs, and overhead rates.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3764.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3501(a)	41:254b(h).	June 30, 1949, ch. 288, title III, § 304A(h), formerly § 304A(i), as added Pub. L. 103-355, title I, § 1251(a)(2), Oct. 13, 1994, 108 Stat. 3284; redesignated as § 304A(h), Pub. L. 104-106, title XLII, § 4201(b)(2)(B), Feb. 10, 1996, 110 Stat. 652.

HISTORICAL AND REVISION NOTES—CONTINUED

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3501(b)	41:254b note.	Pub. L. 110-417, [div. A], title VIII, § 868, Oct. 14, 2008, 122 Stat. 4552.

Subsection (a) of Pub. L. 110-417, § 868 is omitted as unnecessary.

In subsection (b)(1), the words “The Federal Acquisition Regulation” are substituted for “The regulations modified pursuant to subsection (a)” for clarity and conformity with the revised title.

§ 3502. Required cost or pricing data and certification

(a) WHEN REQUIRED.—The head of an executive agency shall require offerors, contractors, and subcontractors to make cost or pricing data available as follows:

(1) OFFEROR FOR PRIME CONTRACT.—An offeror for a prime contract under this division to be entered into using procedures other than sealed-bid procedures shall be required to submit cost or pricing data before the award of a contract if—

(A) in the case of a prime contract entered into after October 13, 1994, the price of the contract to the Federal Government is expected to exceed \$500,000; and

(B) in the case of a prime contract entered into on or before October 13, 1994, the price of the contract to the Federal Government is expected to exceed \$100,000.

(2) CONTRACTOR.—The contractor for a prime contract under this division shall be required to submit cost or pricing data before the pricing of a change or modification to the contract if—

(A) in the case of a change or modification made to a prime contract referred to in paragraph (1)(A), the price adjustment is expected to exceed \$500,000;

(B) in the case of a change or modification made to a prime contract that was entered into on or before October 13, 1994, and that has been modified pursuant to subsection (f), the price adjustment is expected to exceed \$500,000; and

(C) in the case of a change or modification not covered by subparagraph (A) or (B), the price adjustment is expected to exceed \$100,000.

(3) OFFEROR FOR SUBCONTRACT.—An offeror for a subcontract (at any tier) of a contract under this division shall be required to submit cost or pricing data before the award of the subcontract if the prime contractor and each higher-tier subcontractor have been required to make available cost or pricing data under this chapter and—

(A) in the case of a subcontract under a prime contract referred to in paragraph (1)(A), the price of the subcontract is expected to exceed \$500,000;

(B) in the case of a subcontract entered into under a prime contract that was entered into on or before October 13, 1994, and that has been modified pursuant to subsection (f), the price of the subcontract is expected to exceed \$500,000; and

(C) in the case of a subcontract not covered by subparagraph (A) or (B), the price of the subcontract is expected to exceed \$100,000.

(4) SUBCONTRACTOR.—The subcontractor for a subcontract covered by paragraph (3) shall be required to submit cost or pricing data before the pricing of a change or modification to the subcontract if—

(A) in the case of a change or modification to a subcontract referred to in paragraph (3)(A) or (B), the price adjustment is expected to exceed \$500,000; and

(B) in the case of a change or modification to a subcontract referred to in paragraph (3)(C), the price adjustment is expected to exceed \$100,000.

(b) CERTIFICATION.—A person required, as an offeror, contractor, or subcontractor, to submit cost or pricing data under subsection (a) (or required by the head of the procuring activity concerned to submit the data under section 3504 of this title) shall be required to certify that, to the best of the person's knowledge and belief, the cost or pricing data submitted are accurate, complete, and current.

(c) TO WHOM SUBMITTED.—Cost or pricing data required to be submitted under subsection (a) (or under section 3504 of this title), and a certification required to be submitted under subsection (b), shall be submitted—

(1) in the case of a submission by a prime contractor (or an offeror for a prime contract), to the contracting officer for the contract (or a designated representative of the contracting officer); or

(2) in the case of a submission by a subcontractor (or an offeror for a subcontract), to the prime contractor.

(d) APPLICATION OF CHAPTER.—Except as provided under section 3503 of this title, this chapter applies to contracts entered into by the head of an executive agency on behalf of a foreign government.

(e) SUBCONTRACTS NOT AFFECTED BY WAIVER.—A waiver of requirements for submission of certified cost or pricing data that is granted under section 3503(a)(3) of this title in the case of a contract or subcontract does not waive the requirement under subsection (a)(3) of this section for submission of cost or pricing data in the case of subcontracts under that contract or subcontract unless the head of the procuring activity granting the waiver determines that the requirement under subsection (a)(3) of this section should be waived in the case of those subcontracts and justifies in writing the reason for the determination.

(f) MODIFICATIONS TO PRIOR CONTRACTS.—On the request of a contractor that was required to submit cost or pricing data under subsection (a) in connection with a prime contract entered into on or before October 13, 1994, the head of the executive agency that entered into the contract shall modify the contract to reflect paragraphs (2)(B) and (3)(B) of subsection (a). All those modifications shall be made without requiring consideration.

(g) ADJUSTMENT OF AMOUNTS.—Effective on October 1 of each year that is divisible by 5, each

amount set forth in subsection (a) shall be adjusted to the amount that is equal to the fiscal year 1994 constant dollar value of the amount set forth. Any amount, as so adjusted, that is not evenly divisible by \$50,000 shall be rounded to the nearest multiple of \$50,000. In the case of an amount that is evenly divisible by \$25,000 but not evenly divisible by \$50,000, the amount shall be rounded to the next higher multiple of \$50,000.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3765.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3502	41:254b(a).	June 30, 1949, ch. 288, title III, §304A(a), as added Pub. L. 103-355, title I, §1251(a)(2), Oct. 13, 1994, 108 Stat. 3278; Pub. L. 105-261, div. A, title VIII, §805(b), Oct. 17, 1998, 112 Stat. 2083.

§ 3503. Exceptions

(a) IN GENERAL.—Submission of certified cost or pricing data shall not be required under section 3502 of this title in the case of a contract, a subcontract, or a modification of a contract or subcontract—

(1) for which the price agreed on is based on—

(A) adequate price competition; or

(B) prices set by law or regulation;

(2) for the acquisition of a commercial item; or

(3) in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this chapter may be waived and justifies in writing the reasons for the determination.

(b) MODIFICATIONS OF CONTRACTS AND SUBCONTRACTS FOR COMMERCIAL ITEMS.—In the case of a modification of a contract or subcontract for a commercial item that is not covered by the exception to the submission of certified cost or pricing data in paragraph (1) or (2) of subsection (a), submission of certified cost or pricing data shall not be required under section 3502 of this title if—

(1) the contract or subcontract being modified is a contract or subcontract for which submission of certified cost or pricing data may not be required by reason of paragraph (1) or (2) of subsection (a); and

(2) the modification would not change the contract or subcontract from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquisition of an item other than a commercial item.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3766.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3503	41:254b(b).	June 30, 1949, ch. 288, title III, §304A(b), as added Pub. L. 103-355, title I, §1251(a)(2), Oct. 13, 1994, 108 Stat. 3279; Pub. L. 104-106, title XLII, §4201(b)(1), Feb. 10, 1996, 110 Stat. 651.

In subsection (b)(2), the words “as the case may be” are omitted as unnecessary.

§ 3504. Cost or pricing data on below-threshold contracts

(a) **AUTHORITY TO REQUIRE SUBMISSION.**—Subject to subsection (b), when certified cost or pricing data are not required to be submitted by section 3502 of this title for a contract, subcontract, or modification of a contract or subcontract, the data may nevertheless be required to be submitted by the head of the procuring activity, but only if the head of the procuring activity determines that the data are necessary for the evaluation by the agency of the reasonableness of the price of the contract, subcontract, or modification of a contract or subcontract. In any case in which the head of the procuring activity requires the data to be submitted under this section, the head of the procuring activity shall justify in writing the reason for the requirement.

(b) **EXCEPTION.**—The head of the procuring activity may not require certified cost or pricing data to be submitted under this section for any contract or subcontract, or modification of a contract or subcontract, covered by the exceptions in section 3503(a)(1) or (2) of this title.

(c) **DELEGATION OF AUTHORITY PROHIBITED.**—The head of a procuring activity may not delegate the functions under this section.

(Pub. L. 111–350, § 3, Jan. 4, 2011, 124 Stat. 3767.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3504	41:254b(c).	June 30, 1949, ch. 288, title III, § 304A(c), as added Pub. L. 103–355, title I, § 1251(a)(2), Oct. 13, 1994, 108 Stat. 3280; Pub. L. 104–106, title XLII, §§ 4201(b)(1), 4321(e)(3), Feb. 10, 1996, 110 Stat. 651, 675.

§ 3505. Submission of other information

(a) **AUTHORITY TO REQUIRE SUBMISSION.**—When certified cost or pricing data are not required to be submitted under this chapter for a contract, subcontract, or modification of a contract or subcontract, the contracting officer shall require submission of data other than certified cost or pricing data to the extent necessary to determine the reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract. Except in the case of a contract or subcontract covered by the exceptions in section 3503(a)(1) of this title, the contracting officer shall require that the data submitted include, at a minimum, appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price for the procurement.

(b) **LIMITATIONS ON AUTHORITY.**—The Federal Acquisition Regulation shall include the following provisions regarding the types of information that contracting officers may require under subsection (a):

(1) **REASONABLE LIMITATIONS.**—Reasonable limitations on requests for sales data relating to commercial items.

(2) **LIMITATION ON SCOPE OF REQUEST.**—A requirement that a contracting officer limit, to the maximum extent practicable, the scope of any request for information relating to commercial items from an offeror to only that information that is in the form regularly maintained by the offeror in commercial operations.

(3) **INFORMATION NOT TO BE DISCLOSED.**—A statement that any information received relating to commercial items that is exempt from disclosure under section 552(b) of title 5 shall not be disclosed by the Federal Government.

(Pub. L. 111–350, § 3, Jan. 4, 2011, 124 Stat. 3767.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3505	41:254b(d).	June 30, 1949, ch. 288, title III, § 304A(d), as added Pub. L. 103–355, title I, § 1251(a)(2), Oct. 13, 1994, 108 Stat. 3281; Pub. L. 104–106, title XLII, §§ 4201(b)(1), 4321(e)(4), Feb. 10, 1996, 110 Stat. 652, 675; Pub. L. 105–261, div. A, title VIII, § 808(b), Oct. 17, 1998, 112 Stat. 2085.

§ 3506. Price reductions for defective cost or pricing data

(a) **PROVISION REQUIRING ADJUSTMENT.**—

(1) **IN GENERAL.**—A prime contract (or change or modification to a prime contract) under which a certificate under section 3502(b) of this title is required shall contain a provision that the price of the contract to the Federal Government, including profit or fee, shall be adjusted to exclude any significant amount by which it may be determined by the head of the executive agency that the price was increased because the contractor (or any subcontractor required to make the certificate available) submitted defective cost or pricing data.

(2) **WHAT CONSTITUTES DEFECTIVE COST OR PRICING DATA.**—For the purposes of this chapter, defective cost or pricing data are cost or pricing data that, as of the date of agreement on the price of the contract (or another date agreed on between the parties), were inaccurate, incomplete, or noncurrent. If for purposes of the preceding sentence the parties agree on a date other than the date of agreement on the price of the contract, the date agreed on by the parties shall be as close to the date of agreement on the price of the contract as is practicable.

(b) **VALID DEFENSE.**—In determining for purposes of a contract price adjustment under a contract provision required by subsection (a) whether, and to what extent, a contract price was increased because the contractor (or a subcontractor) submitted defective cost or pricing data, it is a defense that the Federal Government did not rely on the defective data submitted by the contractor or subcontractor.

(c) **INVALID DEFENSES.**—It is not a defense to an adjustment of the price of a contract under a contract provision required by subsection (a) that—

(1) the price of the contract would not have been modified even if accurate, complete, and current cost or pricing data had been submitted by the contractor or subcontractor because the contractor or subcontractor—

(A) was the sole source of the property or services procured; or

(B) otherwise was in a superior bargaining position with respect to the property or services procured;

(2) the contracting officer should have known that the cost or pricing data in issue were defective even though the contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the contracting officer;

(3) the contract was based on an agreement between the contractor and the Federal Government about the total cost of the contract and there was no agreement about the cost of each item procured under the contract; or

(4) the prime contractor or subcontractor did not submit a certification of cost or pricing data relating to the contract as required by section 3502(b) of this title.

(d) OFFSETS.—

(1) WHEN ALLOWED.—A contractor shall be allowed to offset an amount against the amount of a contract price adjustment under a contract provision required by subsection (a) if—

(A) the contractor certifies to the contracting officer (or to a designated representative of the contracting officer) that, to the best of the contractor's knowledge and belief, the contractor is entitled to the offset; and

(B) the contractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification), or, if applicable, consistent with subsection (a)(2), another date agreed on by the parties, and that the data were not submitted as specified in section 3502(c) of this title before that date.

(2) WHEN NOT ALLOWED.—A contractor shall not be allowed to offset an amount otherwise authorized to be offset under paragraph (1) if—

(A) the certification under section 3502(b) of this title with respect to the cost or pricing data involved was known to be false when signed; or

(B) the Federal Government proves that, had the cost or pricing data referred to in paragraph (1)(B) been submitted to the Federal Government before date of agreement on the price of the contract (or price of the modification), or, if applicable, under subsection (a)(2), another date agreed on by the parties, the submission of the cost or pricing data would not have resulted in an increase in that price in the amount to be offset.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3768.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3506	41:254b(e).	June 30, 1949, ch. 288, title III, § 304A(e), as added Pub. L. 103-355, title I, § 1251(a)(2), Oct. 13, 1994, 108 Stat. 3282.

§ 3507. Interest and penalties for certain overpayments

(a) IN GENERAL.—If the Federal Government makes an overpayment to a contractor under a contract with an executive agency subject to this chapter and the overpayment was due to the submission by the contractor of defective cost or pricing data, the contractor shall be liable to the Federal Government—

(1) for interest on the amount of the overpayment, to be computed—

(A) for the period beginning on the date the overpayment was made to the contractor and ending on the date the contractor repays the amount of the overpayment to the Federal Government; and

(B) at the current rate prescribed by the Secretary of the Treasury under section 6621 of the Internal Revenue Code of 1986 (26 U.S.C. 6621); and

(2) if the submission of the defective data was a knowing submission, for an additional amount equal to the amount of the overpayment.

(b) LIABILITY NOT AFFECTED BY REFUSAL TO SUBMIT CERTIFICATION.—Any liability under this section of a contractor that submits cost or pricing data but refuses to submit the certification required by section 3502(b) of this title with respect to the cost or pricing data is not affected by the refusal to submit the certification.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3769.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3507	41:254b(f).	June 30, 1949, ch. 288, title III, § 304A(f), as added Pub. L. 103-355, title I, § 1251(a)(2), Oct. 13, 1994, 108 Stat. 3283.

§ 3508. Right to examine contractor records

For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this chapter, an executive agency shall have the authority provided by section 4706(b)(2) of this title.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3770.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3508	41:254b(g).	June 30, 1949, ch. 288, title III, § 304A(g), as added Pub. L. 103-355, title I, § 1251(a)(2), Oct. 13, 1994, 108 Stat. 3283.

§ 3509. Notification of violations of Federal criminal law or overpayments

(a) DEFINITION.—In this section, the term “covered contract” means any contract in an amount greater than \$5,000,000 and more than 120 days in duration.

(b) FEDERAL ACQUISITION REGULATION.—The Federal Acquisition Regulation shall include, pursuant to FAR Case 2007-006 (as published at 72 Fed. Reg. 64019, November 14, 2007) or any fol-

low-on FAR case, provisions that require timely notification by Federal contractors of violations of Federal criminal law or overpayments in connection with the award or performance of covered contracts or subcontracts, including those performed outside the United States and those for commercial items.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3770.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3509	41:251 note.	Pub. L. 110-252, title VI, §§ 6102, 6103, June 30, 2008, 122 Stat. 2386, 2387.

In subsection (b), the words “shall include” are substituted for “shall be amended” and “to include” to reflect the permanence of the provision. The words “within 180 days after the date of the enactment of this Act” are omitted as obsolete.

CHAPTER 37—AWARDING OF CONTRACTS

Sec.	
3701.	Basis of award and rejection.
3702.	Sealed bids.
3703.	Competitive proposals.
3704.	Post-award debriefings.
3705.	Pre-award debriefings.
3706.	Encouragement of alternative dispute resolution.
3707.	Antitrust violations.
3708.	Protests.

§ 3701. Basis of award and rejection

(a) AWARD.—An executive agency shall evaluate sealed bids and competitive proposals, and award a contract, based solely on the factors specified in the solicitation.

(b) REJECTION.—All sealed bids or competitive proposals received in response to a solicitation may be rejected if the agency head determines that rejection is in the public interest.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3770.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3701(a)	41:253b(a).	June 30, 1949, ch. 288, title III, § 303B(a), (b), as added Pub. L. 98-369, title VII, § 2711(a)(2), July 18, 1984, 98 Stat. 1179; Pub. L. 103-355, title I, § 1061(c)(1), Oct. 13, 1994, 108 Stat. 3267.
3701(b)	41:253b(b).	

CONGRESSIONAL STATEMENT OF PURPOSE

Pub. L. 98-577, title I, § 101, Oct. 30, 1984, 98 Stat. 3066, provided that: “The purposes of this Act [see Tables for classification] are to—

“(1) eliminate procurement procedures and practices that unnecessarily inhibit full and open competition for contracts;

“(2) promote the use of contracting opportunities as a means to expand the industrial base of the United States in order to ensure adequate responsive capability of the economy to the increased demands of the Government in times of national emergency; and

“(3) foster opportunities for the increased participation in the competitive procurement process of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.”

EX. ORD. NO. 12979. AGENCY PROCUREMENT PROTESTS

Ex. Ord. No. 12979, Oct. 25, 1995, 60 F.R. 55171, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to ensure effective and efficient expenditure of public funds and fair and expeditious resolution of protests to the award of Federal procurement contracts, it is hereby ordered as follows:

SECTION 1. Heads of executive departments and agencies (“agencies”) engaged in the procurement of supplies and services shall prescribe administrative procedures for the resolution of protests to the award of their procurement contracts as an alternative to protests in fora outside the procuring agencies. Procedures prescribed pursuant to this order shall:

(a) emphasize that whenever conduct of a procurement is contested, all parties should use their best efforts to resolve the matter with agency contracting officers;

(b) to the maximum extent practicable, provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests, including, where appropriate and as permitted by law, the use of alternative dispute resolution techniques, third party neutrals, and another agency’s personnel;

(c) allow actual or prospective bidders or offerors whose direct economic interests would be affected by the award or failure to award the contract to request a review, at a level above the contracting officer, of any decision by a contracting officer that is alleged to have violated a statute or regulation and, thereby, caused prejudice to the protester; and

(d) except where immediate contract award or performance is justified for urgent and compelling reasons or is determined to be in the best interest of the United States, prohibit award or performance of the contract while a timely filed protest is pending before the agency. To allow for the withholding of a contract award or performance, the agency must have received notice of the protest within either 10 calendar days after the contract award or 5 calendar days after the bidder or offeror who is protesting the contract award was given the opportunity to be debriefed by the agency, whichever date is later.

SEC. 2. The Administrator for Federal Procurement Policy shall: (a) work with the heads of executive agencies to provide policy guidance and leadership necessary to implement provisions of this order; and

(b) review and evaluate agency experience and performance under this order, and report on any findings to the President within 2 years from the date of this order.

SEC. 3. The Administrator of General Services, the Secretary of Defense, and the Administrator of the National Aeronautics and Space Administration, in coordination with the Office of Federal Procurement Policy, shall amend the Federal Acquisition Regulation, 48 C.F.R. 1, within 180 days of the date of this order to further the purposes of this order.

WILLIAM J. CLINTON.

§ 3702. Sealed bids

(a) OPENING OF BIDS.—Sealed bids shall be opened publicly at the time and place stated in the solicitation.

(b) CRITERIA FOR AWARDED CONTRACT.—The executive agency shall evaluate the bids in accordance with section 3701(a) of this title without discussions with the bidders and, except as provided in section 3701(b) of this title, shall award a contract with reasonable promptness to the responsible source whose bid conforms to the solicitation and is most advantageous to the Federal Government, considering only price and the other price-related factors included in the solicitation.